

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FIFTEEN

New Orleans, LA

PRISON HEALTH SERVICES, INC.
Employer

and

Case No. 15-RC-8639

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held October 19 and 20, 2005, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.¹

I. ISSUES

International Association of Machinists and Aerospace Workers, AFL-CIO, (the "Petitioner") seeks an election of a unit which includes all full-time and regular part-time health service employees, including medical records clerks, mental health counselors, registered nurses ("RNs"), licensed practical nurses ("LPNs") medical assistants

¹ Upon the entire record in this proceeding, the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.

b. The parties stipulate and I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

c. The parties stipulate and I find that the Petitioner is a labor organization within the meaning of the Act and claims to represent certain employees of the Employer.

d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

("RMAs"), and emergency medical technicians ("EMTs") employed by Prison Health Services, Inc. (the "Employer") at its Escambia County jail facility (Main Jail and Central Booking and Detention Center), in Pensacola, Florida. The Employer, however, contends that RNs and LPN Charge Nurses should not be included in the unit because they are supervisory employees within the meaning of Section 2(11) of the Act. There are five RNs and two LPN charge nurses employed at the facility.² The parties have otherwise agreed upon the composition of the appropriate bargaining unit, and the status of the RNs and LPN charge nurses is the only issue in dispute.

II. DECISION

Based upon the evidence produced at the hearing showing that RNs use independent judgment to discipline employees and effectively recommend discipline, it is concluded that the Employer's RNs are supervisors within the meaning of Section 2(11) of the Act and therefore they are excluded from the appropriate unit for purposes of collective bargaining. Further, the evidence reflects that any supervisory authority possessed by the LPN charges nurses is exercised in a routine, clerical, and/or perfunctory manner. Therefore, it is concluded that LPN charge nurses are not supervisors within the meaning of Section 2(11) of the Act, and they are included in the unit found to be appropriate herein.

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time medical records clerks, mental health counselors, licensed practical nurses (charge and non-charge), medical assistants, and emergency medical technicians employed by the Employer at its Escambia County jail facility in Pensacola, Florida; excluding all registered nurses, office clerical employees, managerial employees, guards, and supervisors as defined in the Act.

The unit found appropriate herein consists of approximately 28 employees for whom no history of collective bargaining exists.³

²The Employer employed Anja Delvalle, Beverly Braun, Elaine Gregory, Lisa Whitlock, and Joyce Wood as RNs at the time of the hearing. The Employer had two open RN positions at the time of the hearing. The Employer employed Trudy Burden and Dana Helms as LPN charge nurses at the time of the hearing.

³ Approximate number of unit employees based upon petition and record testimony.

III. STATEMENT OF FACTS⁴

A. Overview of Employer's Operations at Escambia County Jail

The Employer has a contract with the Escambia County Sheriff Department to provide health care services to approximately 1,900 inmates incarcerated at the county jail. The jail consists of two separate buildings located about a half a mile apart: the main jail and the central booking and detention ("CBD"). The main jail is more of a maximum security facility and contains more single cells. Inmates that are sick or need to be segregated from the general population for a medical or mental health reason are housed at the main jail, which has an infirmary and pharmacy. In the CBD, inmates in the general population are housed in a dormitory style setting. Between seven to nine hundred inmates are housed in each building twenty-four hours per day, seven days per week.

All inmates entering the jail are booked in the CBD building. Upon arrival, entering inmates are sent to the emergency room where an Emergency Medical Technician ("EMT"), which at night is a Licensed Practical Nurse ("LPN") functioning as an EMT, visually screens the inmates to make sure they are not injured or need stitches or have broken bones or are too incapacitated to be booked into in jail. Ninety percent of the time, inmates are healthy and can be incarcerated. If an EMT or LPN has a question about assessing the health of an inmate, an RN at the CBD is called to make an assessment and a decision as what needs to be done to provide the inmate with proper health care.

In addition to the visual screening, all inmates entering the jail receive a medical screening. Their vital signs are taken and they are evaluated for their medical and mental health needs. Inmates that have medical or mental health needs that require them to be isolated are sent to the infirmary in the main jail.

1. Chain of Command

The Employer's chain-of-command hierarchy at the jail is the Health Services Administrator ("HSA"), Medical Director ("MD"), Advanced Registered Nurse Practitioner ("ARNP"), Director of Nursing ("DON"), Registered Nurse ("RN"), Licensed Practical Nurse ("LPN"), and Registered Medical Assistant ("RMA").

Carl Dell is the HSA⁵. Bertha Fountain is the Administrative Assistant to HSA Carl Dell.⁶ Dell is administratively in charge of all the Employer's employees at the jail.

⁴ The Employer called DON Carla Emlet, RN Lisa Whitlock, and LPN Trudy Burden as witnesses. The Petitioner called RMA Rebecca Kenny and RN Joyce Wood as witnesses.

⁵ The parties stipulated at the hearing that Carl Dell is a supervisor within the meaning of Section 2(11) of the Act since he possesses and exercises one or more of the powers enumerated in Section 2(11).

⁶ The parties stipulated at the hearing that Bertha Fountain is a confidential employee and

Dell sets the wage and salary ranges that the Employer pays its employees. Dell and Fountain monitor the hours worked by employees, including overtime hours. RNs and LPN charge nurses⁷ are not salaried employees. They are paid by the hour and receive time-and-a-half for any overtime hours the DON authorizes them to work. In lieu of overtime pay, the RNs can request compensatory hours to be used at a time approved by the DON.

Joseph Monastero is the MD. Monastero receives protocols from the Employer's corporate office, and as necessary, modifies the protocols to meet the site-specific medical care needs of inmates housed at the Escambia County jail. Protocols are guidelines utilized by RNs, LPNs, and RMAs in assessing the medical condition of inmates. The protocols show what actions are to be taken and who should be called. In the event RNs, LPNs, RMAs, and EMTs need something in addition to protocols written by the MD, they have to get a verbal order from the MD or the ARNP.

Betsy McCormick is the ARNP and serves as an adjunct to the MD. McCormick does chronic care clinics sick call and can write orders and prescriptions for inmates.

Carla Emlet is the DON. Emlet is responsible for making and implementing policies and procedures. Emlet interviews applicants for the positions of RNs, LPNs, RMAs, and EMT's and makes the hiring decisions. Additionally, she is responsible for staffing and making out work schedules for all RNs, LPNs, RMAs, and EMTs, including monthly schedules for employees who are assigned to work specific tasks, such as wound care. In making the schedules, Emlet makes allowance for understaffing in the event an employee calls in sick. Emlet also helps with the medical care provided to inmates.⁸

Bertha Lewis is the Medical Records Supervisor.⁹

2. Hierarchy of pertinent Medical Care Providers in Main Jail and CBD

The Employer's hierarchy of medical care providers includes RNs, LPNs, RMAs, and EMTs. All RNs function in the same capacity. RNs and LPN charge nurses work

should be excluded from the appropriate unit.

⁷ According to DON Carla Emlet, the only two charge LPNs are not called charge nurses per se but rather the infirmary nurses. For clarity purposes, Trudy Burden and Dana Helms will be referred to herein as LPN charge nurses.

⁸ The parties stipulated at the hearing that DON Carla Emlet is a supervisor within the meaning of Section 2(11) of the Act since she possesses and exercises one or more of the powers enumerated in Section 2(11).

⁹ The parties stipulated at the hearing that Bertha Lewis is a supervisor within the meaning of Section 2(11) of the Act since she possesses and exercises one or more of the powers enumerated in the Act.

with non-charge LPNs, RMAs, and EMTs. The non-charge LPNs perform the same job functions as the RMAs, and one non-charge LPN functions as an EMT. RMAs perform the following tasks: order medication; do medication passes (inmate medication orders for chronic or acute illness) twice a day; take off orders and put them on the medication administration record (“MAR”); and retrieve medication from the pharmacy and administer the medicine to inmates.

3. Infirmary and Pharmacy at the Main Jail

The DON works at the main jail between 8:00 a.m. and 4:30 p.m. Monday through Friday, and she is on call twenty-four hours per day, seven days per week.

The RNs, LPNs, RMAs, and EMTs work one of two twelve-hour shifts. The day shift is from 7:00 a.m. to 7:00 p.m., and the night shift is from 7:00 p.m. to 7:00 a.m. The DON assigns a RN to work the day shift at the main jail and another RN to work the night shift.

(a) Infirmary

A 54-bed infirmary located in the main jail serves as an acute hospital. Inmates that are acutely ill, medically or mentally, are housed in the infirmary. The DON assigns two LPN charge nurses and two RMAs to work in the infirmary on the day shift. A RN also works in the infirmary on the day shift when the Employer is fully staffed. On the night shift, a RN is assigned to work in the infirmary. The night shift RN is also over the main jail and the CBD. At night, one RMA is assigned to work in the main jail, and one LPN/EMT and one RMA are assigned to work in the CBD. During the day shift on weekends, one LPN charge nurse is assigned to work in the pharmacy. The weekend charge nurse is also over the main jail and the CBD during the day shift.

(b) Pharmacy

An on-site pharmacy is located in the main jail. All medications are logged in at the pharmacy. Medications are then separated according to whether the inmates are housed at the main jail or at the CBD. Medications designated for inmates housed at the CBD are boxed and taken to the CBD. The DON assigns one RN to work the pharmacy between the hours 7:30a.m and 4:00 p.m. Two RMAs work in the pharmacy with the RN.

4. Central Booking and Detention (“CBD”)

An ARNP and a physician are present in the CBD during the day shift. The DON assigns one RN, two non-charge LPNs, two RMAs, and three EMTs to work in the CBD during the day shift. The non-charge LPNs and the RMAs perform the same job, primarily medication carts. One non-charge LPN is assigned to work in the CBD and functions as an EMT. At times, particularly weekends, there is no RN in the CBD.

The first level of sick call triage for incoming patients in the CBD is the RMA or LPN/EMT. If the RMAs or LPNs can not handle the medical issue utilizing the established protocols and their experience, then they may go directly to the nurse practitioner on site for assistance. Generally, however, RMAs and LPN/EMTs seek guidance from an RN, and on weekends the LPN charge nurse.

RNs are responsible for providing oversight and guidance to the RMAs and LPN/EMTs in triage situations and do not have to confer with the DON when doing so. RNs devote a lot of time providing on-the-job training for new RMAs and LPN/EMTs and teaching them the sick-call process and protocols and guidelines for dealing with certain medically related situations. As part of the teaching process, RNs jump in and offer guidance when RMAs and LPN/EMTs do something incorrectly. RNs are expected to follow established protocols and use their discretion as to how to treat patients and how to deal with medical situations, which may require that RNs give medically related assignments to RMAs and LPN/EMTs, such as checking blood pressures and treating inmate wounds. The RMAs and LPN/EMTs are expected to carry out the assignments without checking with anyone else, and if they fail to do so, the RNs have the authority, without getting permission from the DON, to issue written counseling to any RMAs and LPN/EMTs who do not perform their job. RNs generally discuss any such written counseling with the DON, and the DON supports the RNs decision. The RN is expected to use discretion in deciding who to write up and for what purpose.

If the medical issue is of an emergency or surprising nature that the RNs can not resolve by using the established protocols and their experience, then they consult the ARNP or the physician. Even when confronted with a true medical emergency, RNs can not send an inmate to the infirmary or to a hospital emergency without permission from the physician. Medical issues not resolved by the ARNP are then referred to the physician.

B. Job Duties of RNs and LPNs

1. RNs

The DON goes over the job description for RNs when they are interviewed. The record reflects that the DON refers to RNs as “RN supervisors” and has listed such on at least one RN’s performance evaluation. The Employer’s job description for RNs lists the job title simply as “Registered Nurse.” The job description provides in pertinent part that RNs “implement professional nursing services in a thorough and competent manner in accordance with standards, rules, and protocols policies and procedures”; “administer medication in a safe and efficient manner consistent with orders, rules, protocols, policies and procedures as necessary”; “respond to medical emergencies with emergency equipment in immediate manner per policies and procedures”; “initiate appropriate treatment and/or medications in emergency situations based on assessment and in accordance with standards, protocols, policies and procedures”; “maintain accurate counts of narcotics and sharps instruments each shift when required”; and “attend monthly meetings.” The job description also reflects that the position requires that RNs

possess “ability to supervise, educate, and discipline staff (RNs, LPNs, MAs, and CNAs¹⁰) accordingly.”

According to the DON, all RNs have the same job description, responsibility for treating patients, for supervising employees underneath them, and for directing the treatment of patients as needed, depending on the medical needs of the inmates. RNs report directly to the DON, and the DON completes performance evaluations for all RNs.

The DON generally assigns newly hired RNs at the CBD to work with an experienced RN that’s already working at the CBD. The experienced RN explains the job duties and responsibilities to the new RNs. The DON also sends new RNs to the infirmary to work as part of their training. In the infirmary, the new RNs are trained by LPN charge nurses. The DON does not allow new RNs to function independently until she is comfortable that they are able to assume their responsibilities. The DON gets feedback on the new RNs proficiency from experienced RNs that are assigned to train new RNs, and the DON meets individually with new RNs before allowing them to function independently.

Occasionally, the DON has RNs sit in during portions of an applicant’s interview and offer their opinion on applicants. The DON may consider the opinions of the RNs, but she does not rely on the RNs to assess the ability of applicants. Likewise, the DON may consult with RNs when she is contemplating terminating an employee, but termination decisions are made solely by the DON.

RNs work in various assignments throughout the jail. All inmates that are booked into the jail and remain incarcerated in either the main jail or the CBD at least fourteen days receive a medical and mental evaluation. As part of the evaluation, the RNs ask the inmates a set of questions regarding their history of diseases. The RN assigned to perform the evaluation is referred to as the history and physical RN.

RNs are also assigned to operate the Employer’s pharmacy. Doctors write prescriptions for medications and determine what medications are ordered. The medications are then ordered from the pharmacy via a computerized system. RNs log in the medications upon their arrival, put the medications on a medication cart, and distribute the medication to the appropriate inmates. The RN assigned to the pharmacy is referred to as the pharmacy RN.

Each month, a pharmacy consultant comes to the pharmacy to check for expired medications and to make sure medications are properly labeled. The pharmacy RN accompanies the consultant as he does his inspection. If the consultant finds any problems or discrepancies that need to be corrected, the consultant investigates the discrepancies and tells the pharmacy RN what things need to be improved on or done differently. At the conclusion of the monthly inspection, the consultant and the pharmacy

¹⁰ The Employer does not employ any CNAs at the Escambia County jail.

RN sign a medication inspection report. The pharmacy RN can discuss the medication inspection report with the DON before signing it, but is not required to do so.

At the time of the hearing, the Employer was in the process of converting from ordering inmate specific medications to stocking medications at the pharmacy. To facilitate the conversion, the Employer sent the pharmacy RN and an RMA that works in the pharmacy to an in-service training at one of its sister sites that already had implemented the system. The pharmacy RN and the RMA work on opposite shifts and were selected to attend the training so the Employer would have someone on each shift that knew how to get the stock medication system up and running. The DON assigned the pharmacy RN to give a presentation on the stock medication system at the October 2005 monthly nurse staff meeting. The pharmacy RN discussed how the system is designed to operate and answered questions. Once the conversion to the stock medication is complete, the Employer will create a protocol as to when medication should be reordered. In the interim, the pharmacy RN shows the RMAs how to set up their medication carts so their jobs can be performed efficiently.

RNs provide medical care information to a medical advisory committee as required, which is about every three or four months. The Employer's regional vice president, the MD, the HSA, and the DON attend monthly medical advisory committee meetings with representatives of the Escambia County Sheriff Department. It is customary for RNs, as well as mental health counselors or dentists or anyone else with pertinent information regarding a particular issue being considered by the committee, to attend the meetings. The purpose of the meetings is for the Employer to outline for the sheriff's department the work performed by the Employer's medical providers throughout the month, such as how many sick calls were performed, how many emergency evaluations were performed, how many inmates received x-rays, and how many inmates were sent out to hospitals. At the April 2005 meeting, a RN in the CBD that handled the nurse sick call program, in which a nurse takes messages when inmates call in with medical issues, attended the meeting. Prior to the meeting, the RN was instructed that her role in the meeting was to discuss the nurse sick call program. The RN departed the meeting once she provided the information to the committee.

RNs perform sharps counts and narcotic counts once daily during the change of shifts meeting with the outgoing RN. This involves taking an inventory of syringes, needles, and controlled substances and reviewing paperwork to make sure there is an accounting for used syringes, needles, and control substances. If there are any discrepancies in the counts, the RNs are responsible for investigating and resolving the discrepancies. During the change of shifts, RNs alert the oncoming RN or LPN charge nurse as to the status of operations, including any special treatments given and medications provided to inmates, new orders, changes in medication, and other documentation.

RNs are authorized to carry cell phones with them while they are in the jail.

2. LPN Charge Nurses

The Employer's job description for LPNs is not contained in the record. According to the DON, there are LPNs and LPN charge nurses. It is not a promotion for an LPN to be designated as a charge nurse. The LPN charge nurses are experienced and trained and have a desire to serve in that capacity. Any difference in pay received by LPNs and LPN charge nurses is attributed to longevity and merit, not position.

LPNs and LPN charge nurses have different job duties. The LPNs work in triage and on medication carts and basically perform the same duties as the RMAs. The LPN charge nurses, however, are in charge of the 54-bed infirmary in the main jail and work independently. The charge nurses are responsible for the health care of all medical and mental health patients while they are in the infirmary, which includes treatments, documentation, medication administration, IVs, labs, rounds with the doctor, and any emergencies that come up. Two RMAs work under the charge nurses in the infirmary during the day shift, and the RMAs seek guidance from the charge nurses regarding medication, treatment, and documentation. Like the RNs, LPN charge nurses have the authority to offer guidance to RMAs in how to treat inmate patients, and if confronted with a medical issue that can not be resolved utilizing established protocols, the charge nurses have the discretion to call the RNs, the DON, the ARNP, or the physician.

Additionally, during the day shift on weekends, the LPN charge nurses assume full charge of the main jail and the CBD. The charge nurses perform functions on weekends that are performed by RNs during the weekdays, such as sick call, blood sugar checks, triage, respond to emergencies, and call the physician as needed. Like the RNs, LPN charge nurses also attend a monthly nurse staff meeting with the DON, the RMAs, and LPN/EMTs.

LPN charge nurses perform narcotic counts once daily during the change of shifts meeting with the outgoing RN or LPN charge nurse. This involves taking an inventory of controlled medications and reviewing paperwork to make sure there is an accounting for the medication. If there are any discrepancies in the counts, the RNs are responsible for investigating and resolving the discrepancies. During the change of shifts, LPN charge nurses also alert the oncoming RN or LPN charge nurse as to treatments given and medications provided to inmates, new orders, changes in medication, and other documentation.

LPN charge nurses over the infirmary are authorized to carry cell phones with them while they are in the jail. RMAs and LPN/EMTs are not allowed to carry cell phones in the jail.

(a) Assignment and Responsible Direction of Work

The daily work schedule for each employee, including RMAs and LPN/EMTs, is prepared by the DON. The employee staffing ratios are set by the Employer's contract with the Escambia County Sheriff Department. Employees submit their requests for

vacation time to the DON at least two weeks and preferably a month in advance, and the DON makes a monthly schedule in which each employee is assigned to a specific shift, a specific location, and to work specific days of the week. For instance, an LPN or an RMA is assigned to perform wound care on a daily basis. Due to absenteeism, it is sometimes necessary to secure replacements for absent RMAs and LPN/EMTs. Only in such immediate need situations are RNs and LPN charge nurses, particularly on weekends, authorized to alter the work schedule to secure replacements to fill the employee gap. RNs and LPN charge nurses have the authority to fill the gap by requesting employees who are about to complete a shift to extend their work hours into the next shift, utilizing a call return list to call employees who are not scheduled to work and request they come in, or independently transfer an employee from the main jail to the CBD and vice versa on a temporary basis. In one instance, an employee did not want to be temporarily transferred. The RN consulted with the DON and then ordered the employee to work as directed. The employee complied with the order. In securing replacements to fill employee gaps, RNs and LPN charge nurses do not know whether the employees will accrue overtime hours because RNs and LPN charge nurses do not have access to or see the time cards of employees. RNs and LPN charge nurses on the day shift normally consult with the DON when it is necessary to secure replacements, and the DON assists in securing replacements by contacting employees herself or by telling the RNs and LPN charge nurses the names of employees to contact.

RNs and LPN charge nurses have responsibility for RMAs and LPN/EMTs in the treatment provided to inmates. RNs, in monitoring the medical care provided to inmate patients, may direct RMAs to perform tasks such as drawing blood, checking temperatures and blood pressures, and administering medication. Every employee has a job description and a schedule of when and how to do tasks. RNs and LPN charge nurses monitor the work performed by RMAs and LPN/EMTs and if an employee deviates from the assigned tasks, the RNs and LPNs may verbally instruct the employee to perform some task correctly or to perform certain functions as needed.

The record contains protocols for assessing and providing care for conditions such as constipation, bites, upper respiratory complaints, and acute sinus pain. There is no protocol for some medical conditions such as wound care. In such situations, the physician must be called for an order. When present, RNs make the call to the doctor. In other situations, such as if an inmate arrives at the main jail clutching his chest, the EMTs, pursuant to their experience and training, can refuse to admit the inmate into the jail and direct the sheriff department personnel to take the inmate to an emergency room. The EMTs generally call for an RN to look at the inmate, but can make the decision without consulting an RN.

During each 12-hour shift, employees receive paid breaks, including a 15-minute break in the morning, a 30-minute break for lunch, and a 15-minute break in the afternoon. The work schedules made by the DON do not include break schedules. Accordingly, when RMAs and LPN/EMTs take their breaks, they notify the RNs and LPN charge nurses on duty. RMAs and LPN/EMTs decide when to take their breaks, but RNs and LPN charge nurses monitor when they take breaks, and if necessary, alter when

RMA's and LPN/EMTs are allowed to take breaks. RNs and LPN charge nurses do not have to consult the DON when deciding when RMA's and LPN/EMTs are allowed their breaks. To ensure proper employee coverage, lunch breaks have to be staggered.

(b) Discipline

The Employer's counseling and corrective discipline procedure provides in pertinent part that discipline may include, but is not limited to oral and written warnings, suspensions without pay, demotion and termination. The Employer has a progressive disciplinary policy beginning with an oral warning, then proceeding to a written warning, followed by a second written warning. The written warnings can result in suspension or termination. RNs and LPN charge nurses can not suspend or terminate employees. Suspensions and terminations are handled by the DON and the HSA. For serious offenses, steps in the progressive discipline procedure may be bypassed.

RNs have the authority to orally discipline an employee on the spot when they observe the employee doing something wrong. Examples of things that RNs can orally discipline employees for include poor documentation, not giving medication, not completing work for the day, and staying on break too long. According to the DON, the oral warnings issued by RNs may or may not be documented in the employees' personnel file. Additionally, if an employee reports to work and displays bizarre behavior or a disrespectful attitude and is insubordinate, the RNs can tell the employee to clock out and go home. In the past year, RNs have sent employees home twice. The RNs did not consult with the DON until after the employees had been sent home. The record does not contain details as to the events that gave rise to the employees being sent home. Further, RNs have the discretion to formally write up employees without consulting the DON. According to RN Lisa Whitlock, she issued a written discipline to a RMA that refused to follow her orders. The record does not contain specific details of the incident nor does it contain a copy of any such written discipline issued by Whitlock. According to RN Joyce Woods, she issued a written discipline to an employee that cursed her and was disrespectful to her. She reported the incident to the DON, and the DON told her what to include in the write up. The record does not contain a copy of the written discipline issued by Woods.

The DON fills out most employee counseling reports and nurse counseling reports, both of which are used when an employee has not followed proper standards of care. The record contains a written employee counseling report and a written nurse counseling report, both issued to an RMA. The employee counseling report was issued to the RMA for her "failure to fill out lab slips correctly resulting in having to redraw blood for chronic care clinic." The corrective action decision was to "have Lisa Martinez RN supervisor in-service on filling out lab slips correctly." According to RN Whitlock, whose maiden name is Martinez, the lab notified the Employer that several slips were not filled out correctly and the DON made the decision to issue the employee counseling report and actually filled out the report. The record reflects that Whitlock's involvement with the issuance of the report was limited to signing it and discussing it with the employee.

Whitlock also was involved with the nurse counseling report that was issued to the same RMA for her failure to “document in chart laboratory draws, date, time and what lab draws were drawn.” The corrective action taken was to have the RMA report to the supervisor if she is unable to locate the chart. Whitlock determined whether to start the investigation that led to the issuance of the nurse counseling report, determined how the investigation would be done, and decided to issue the nurse counseling report without getting prior permission from the DON. The record does not contain details of how Whitlock conducted her investigation. According to Whitlock, once she decides to issue a nurse counseling report, it is the Employer’s policy and procedure to have the DON present when the counseling report is discussed with the employee. In this instance, Whitlock completed the “problem identified” section of the counseling report, and the DON completed the “counseling decision” section of the report. The DON is always present when the counseling reports are discussed with the employee. The reports go into employee files and are used for evaluation purposes.

RNs do not discipline other RNs.

LPN charge nurses do not complete any employee counseling forms. According to the DON, if a RMA does something improper, the charge nurses handle the problem as it arises. LPN charge nurses do not have the discretion to formally write up employees, but they can notify the DON when issues arise that they are not able to resolve informally.

The DON handles all absentee and tardiness issues.

(c) Evaluations, Rewards and Adjustment of Grievances

All employees receive a performance evaluation on their anniversary date. Three of the five RNs have been trained to complete performance evaluation forms for RMAs and LPN/EMTs. According to the DON, RNs have completed about four performance evaluations within the last year. The record contains only two evaluation forms: one completed by RN Elaine Gregory for an RMA dated October 10, 2004, and one completed by RN Lisa Martinez (Whitlock) for an RMA dated October 31, 2004. RN Elaine Gregory did not testify at the hearing. According to RN Lisa Whitlock, she completed the evaluation as part of her training. It was the first evaluation she had done on an employee. Whitlock signed the evaluation form, gave it to the DON, and then she and the DON sat down with the employee and went over the evaluation form. The employee was then asked to sign the evaluation form, which was placed in the employee’s personnel file. At the time of the hearing, Whitlock had not done evaluations on any other employees. According to RN Joyce Wood, she has completed only one evaluation, which was for an RMA that she had worked with for two or three weeks. The DON asked Wood to complete the evaluation and told Wood what to write on the evaluation form. Wood then met alone with the RMA to discuss the evaluation. All other performance evaluations were performed by the DON.

RNs do not have access to employee files, but according to the DON, the evaluations done by the RNs are placed in the employees' personnel files. The HSA has the discretion to consider the evaluations when awarding merit raises. The HSA did not testify at the hearing. All promotions are handled by the DON and the HSA. RNs are not allowed to give any kind of awards or benefits to employees.

LPN Charge Nurses do not complete performance evaluations on any employees. The DON completes the evaluations and may seek input from the LPN Charge Nurses.

The Employer's employee handbook contains a problem solving procedure which provides that employees should seek guidance and advice first from their supervisor on any work-related problems, including performance evaluations and discipline, so that the issues can be resolved promptly and fairly. If the employees are not satisfied with their supervisor's response, they should present the problems in writing to the next level(s) of management. The record reflects that Employee grievances are addressed through the Employer's chain-of-command hierarchy, beginning with the non-charge LPNs. The record contains little specifics of RNs and LPN charge nurses adjusting grievances or playing a role in the resolution of employee complaints. According to LPN charge nurse Trudy Burden, if RMAs in the infirmary approach her with a disagreement about who can take lunch at a specific time, she will resolve the matter by deciding which RMA goes at the requested time.

RNs and LPN charge nurses are paid hourly and receive the same benefits as the RMAs and LPN/EMTs. RNs and LPN charge nurses, like the RMAs and LPN/EMTs, are not included in the managers meeting with the DON and the HSA. Like the RNs and the LPN charge nurses, RMAs and LPN/EMTs also have change of shift meetings with their counterparts.

IV. DISCUSSION

The Employer asserts that all RNs and the LPN charge nurses are supervisors within the meaning of Section 2(11) of the Act and should be excluded from any unit found to be appropriate. Specifically, the Employer contends that RNs and LPN charge nurses use independent judgment in assigning and/or directing employees. Contrarily, the Petitioner contends that the duties performed by all RNs and the LPN charge nurses are routine and clerical in nature and do not require the use of independent judgment to qualify them as statutory supervisors, and therefore, they should be included in the appropriate unit. A review of the indicia of supervisory status as contained in the Act shows that based on the evidence presented at the hearing, RNs, but not LPN charge nurses, are supervisors within the meaning of Section 2(11) of the Act. Accordingly, RNs must be excluded from the appropriate unit in this case, and LPN charge nurses must be included.

To determine whether an individual is a supervisor within the meaning of Section 2(11) of the Act, the Board examines: (1) whether the individual has the authority to engage in any 1 of the 12 enumerated powers listed in Section 2(11) of the Act; and (2)

whether the exercise of such authority requires the use of independent judgment. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 707 (2001). The twelve powers expressively set forth in Section 2(11) of the Act in defining a supervisor are the authority to “hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly direct them, or to adjust their grievances, or effectively recommend such action.” In *Kentucky River*, the Court determined that it is appropriate for the Board, when determining whether an employee exercises independent judgment, to consider the degree of discretion an employee exercises, but inappropriate to consider the type of discretion, such as professional or technical.

The party alleging supervisory status has the burden of proving that it exists. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710. A lack of evidence is construed against the party asserting supervisory status. The Board is reluctant to confer supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. *Vencor Hospital*, 328 NLRB 1136, 1138 (1999). The Board has found that a particular indicia of supervisory status has not been established if the evidence is in conflict or otherwise inconclusive regarding that indicia. *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisor authority. *Sears Roebuck & Co.*, 304 NLRB 193 (1991).

The Employer in this matter is the party asserting the supervisory status of the RNs and the LPN charge nurses, and accordingly, the burden of proof rests with the Employer. The Employer has not asserted, nor has it provided any evidence to establish that the RNs or the LPN charge nurses possess the authority to hire, transfer, suspend, lay off, recall, promote, discharge, or reward employees, or effectively recommend such actions. The Employer does contend, however, that the RNs and the LPN charge nurses can assign and/or responsibly direct employees in accordance with *Kentucky River, supra*. Additionally, the Employer has provided evidence to attempt to establish that RNs and LPN charge nurses discipline employees and adjust employee grievances, or effectively recommend such actions. The Employer has met its burden of proof only on the issue of RNs disciplining employees. Thus, it is determined that RNs, but not LPN charge nurses, are supervisors within the meaning of Section 2(11) of the Act.

A. Assignment and Direction of Work

Based on the evidence presented at the hearing in this matter, the assistance of RNs and LPN charge nurses in assigning work to RMAs and LPN/EMTs is a routine activity done within the parameters of a set schedule and does not require use of independent judgment and, therefore, does not confer supervisory authority on the RNs and the LPN charge nurses. The record evidence fails to support the Employer’s assertion that RNs and LPN charge nurses independently decide what type of work is to be done on each shift and direct employees to perform it. Rather, the evidence reflects that the DON completes the work and task assignment schedules for the RMAs and LPN/EMTs that work with the RNs and the LPN charge nurses. Thus, it is the DON who

determines the initial work assignments for the employees. The evidence does reflect that RNs and LPN charge nurses provide oversight and guidance to employees in triage situations which may require RNs to give routine task assignments to RMAs and LPN/EMTs, such as checking blood pressures and treating inmate wounds. Such tasks, however, are routine aspects of patient care and require little instruction from RNs and LPNs, particularly in light of the Employer's established protocols regarding patient care. Further, the evidence does not reflect that the skill level between RMAs and LPN/EMTs vary significantly or to such a degree that would require the RNs and the LPN charge nurses to exercise a high degree of discretion in deciding which employee treats an inmate patient. The Employer failed to present evidence to establish that the RNs and LPN charge nurses use independent judgment in assigning work as opposed to following routine or standard practices. *St. Clair Die Casting*, 423 F.3d 843 (8th Cir. 2005).

Moreover, to the degree the Employer asserts that RNs and LPN charge nurses hold shift change meetings to decide on their own accord the medical assignments that need to be performed on the incoming shift and what personnel changes are needed to carry out the work required to meet the needs of the inmate patients, the evidence again reflects that the DON makes the monthly work and task assignment schedules. Therefore, employees are aware where they are to work and what tasks they are to perform, such as wound care, on a monthly basis. The record does reflect that due to absenteeism, it is sometimes necessary for RNs and LPN charge nurses to secure replacements to fill gaps in employee coverage and in doing so, they may temporarily transfer an employee from the main jail to the CBD and vice versa. Nonetheless, the evidence shows that the DON preplans for such situations as evidenced by the existence of an employee return call list. Additionally, the DON assists in securing replacements by contacting employees herself or by telling the RNs and LPN charge nurses the names of employees to contact. Further, the record does not contain even a scintilla of evidence to suggest that RNs and LPN charge nurses have authority to add to the staffing levels established by the DON. In the one instance that a RN ordered an employee to report to work out of schedule, the RN consulted with the DON before doing so. The details of what the RN told the employee after speaking with the DON are not included in the record. Calling in employees without the ability to compel an employee to come to work does not confer supervisory status. *Beverly Enterprises v. NLRB*, 148 F. 3d 1042, 1047 (8th Cir. 1998), *enfg. Beverly Enterprises-Minnesota, Inc.*, 323 NLRB No. 200 (2000); *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 (2000).

Based on the RNs and LPN charge nurses lack of control in the work assignments of RMAs and EMTs, the evidence fails to establish that RNs and LPN charge nurses exercise independent judgment in assigning work to and directing employees in the performance of their duties. To the extent the Employer relies upon the RNs and LPN charge nurses authority to make nursing diagnosis, assess inmates, perform triage on incoming inmates, pass medications, do history and physical, order medications, call a doctor if necessary, and send inmates to the emergency room outside the jail if necessary, I note that such activities relate to how RNs and LPNs perform their own job and does not address how they assign and/or direct others to perform tasks.

Further, the role of RNs and LPN charge nurses in authorizing the break periods is limited. The evidence reflects that employees notify the RNs and LPN charge nurses when they decide to take their breaks, which are monitored by the RNs and LPN charge nurses and altered only in to provide employee coverage in the event of an emergency. The RNs and LPN charge nurses limited role in authorizing breaks is done in a routine manner and does not require any independent judgment. *Providence Hospital*, 320 NLRB 717, 732 (1999) and *Health Resources of Lakeview*, 332 NLRB 878 (2000).

Based upon the above, the Employer has failed to carry its burden of establishing that RNs and LPN charge nurses assign and responsibly direct the work of RMAs and LPN/EMTs using independent judgment in a manner conferring supervisory status.

B. Discipline

The record reveals that RNs, but not LPN charge nurses, have the authority to discipline RMAs and LPN/EMTs in a variety of ways. A RN can verbally warn an employee for a violation, or the RN can give the employee what is referred to as an “in-service” where the RN demonstrates the correct manner to perform a task under Employer guidelines. RNs can also give the employees a written employee counseling report or a nurse counseling report that is placed in the employee’s file. Finally, a RN can order an employee to clock out and go home if the employee reports to work and displays bizarre behavior or a disrespectful attitude and is insubordinate. The decision as to which type of discipline to issue, or whether to issue any discipline at all, is left to the discretion of the RN. In that respect this case is similar to a recent Board decision in *Wilshire at Lakewood*, 345 NLRB No. 80 (September 30, 2005). In that case the board found that a registered nurse was a supervisor based on her ability to discipline employees. If the nurse saw an employee commit an infraction, then the nurse could issue a disciplinary write-up to the employee. The nurse could also choose to overlook the infraction and not issue a write-up to the employee. The Board held that this discretion on the part of the nurse evidenced the use of independent judgment in exercising her decision to issue the write-up to the employee. The evidence was unclear as to what the ramifications to the employee were for having a disciplinary write-up issued, but the Board said that the write-up initiated the employer’s disciplinary process and was therefore discipline.

Under the Board’s rationale in *Wilshire at Lakewood*, the RNs in the instant case are supervisors within the meaning of Section 2(11) of the Act. The RNs can issue employee counseling reports or nurse counseling reports and these reports are clearly a part of the Employer’s progressive discipline process. The reports are made a part of the offending employee’s personnel file. Therefore, based on *Wilshire at Lakewood*, such actions constitute discipline as used in Section 2(11) of the Act. Further, based on the rationale of the same case, since RNs in the instant case have the discretion to issue employee counseling reports or nurse counseling reports or not issue such a report for an infraction, or to issue some other form of discipline such as a verbal warning, the RNs exercise independent judgment in determining the discipline. Therefore, the RNs in this case are supervisors within the meaning of Section 2(11) of the Act.

There was also record evidence that RNs have the authority to send employees home for displaying bizarre behavior or a disrespectful attitude or being insubordinate. The record suggests that RNs actually sent employees home twice within the last year, yet the record is void of any specific details regarding the incidents.

Accordingly, the evidence concerning the authority of RNs to utilize independent judgment in disciplining employees by issuing counseling reports is sufficient to establish that they are supervisors within the meaning of the Act.

The LPN charge nurses, unlike the RNs, do not complete any employee counseling reports. If an RMA or LPN/EMT repeatedly performs work in an improper manner, the LPN charge nurses notify the DON. The LPN charge nurse and the employee then meet with the DON to discuss the matter. The record does not contain any evidence that LPN charge nurses have sent an employee home for misconduct or for any other reason. Therefore, the evidence is insufficient to establish that LPN charge nurses discipline employees.

C. Performance Evaluations and Adjustment of Grievances

The Employer has presented evidence to establish that RNs and LPN charge nurses evaluate the job performance of RMAs and LPN/EMTs. Only when evaluations affect the wages or employment status of employees will the individual performing the evaluations will be found to be a supervisor. *Franklin Hospital Medical Center d/b/a Franklin Home Health Agency*, 337 NLRB 826 (July 2002); *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). In the instant case, the Employer has failed to present evidence that definitively establishes that evaluations performed by RNs lead to automatic wage increases for the evaluated employees or any other employment action. The authority to evaluate employees without the authority to recommend specific personnel action is insufficient to confer supervisory status. *Passavant Health Center*, 284 NLRB 887, 891 (1987). Thus, the evidence is insufficient to support a finding that the RNs completion of evaluations confers supervisory status on RNs. Rather, the evidence suggests that the performance evaluations are reportorial in nature, and do not evidence supervisory authority. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Notably, the Employer presented no evidence to show that RNs and LPN charge nurses are held responsible for or are also evaluated on how they perform their supervision of RMAs and LPN/EMTs. The Employer entered only one performance evaluation of an RN into evidence and no evaluation for any LPN charge nurses.

Additionally, the Employer presented evidence to establish that RNs and LPN charge nurses possess the authority to adjust employee grievances. The Employer's employee handbook contains a problem solving procedure which provides that employees should seek guidance and advice first from their supervisor on any work-related problems. The record reflects that employee grievances are addressed through the Employer's chain-of-command hierarchy, beginning with the non-charge LPNs. The record contains little specifics of RNs and LPN charge nurses adjusting grievances or

playing a role in the resolution of employee complaints, other than when RMAs in the infirmary disagree about who can take lunch at a specific time. The authority to resolve minor squabbles such as which of two employees can take lunch at a designated time is limited authority and does not warrant the inference that RNs and LPN charge nurses possess statutory authority to adjust grievances and is insufficient to establish supervisory status. *Ken Crest_Services*, 335 NLRB 777, 779 (2001); *St. Francis Medical Center-West*, 323 NLRB 1046 (1997).

D. Secondary Indicia

There are also secondary indicia both of supervisory status and non-supervisory status on the part of RNs and LPN charge nurses. RNs are the highest ranking medical providers at the jail during overnight hours, and LPN charge nurses are the highest ranking medical providers at the jail on the weekend day shift. RNs and LPN charge nurses are paid hourly and receive the same benefits as the RMAs and LPN/EMTs. RNs and LPN charge nurses, like the RMAs and LPN/EMTs, are not included in the managers meeting with the DON and the HSA. These indicia are insufficient by themselves to confer supervisory status. However, when considered in conjunction with the evidence of RNs authority to discipline employees, the evidence that RNs are the highest ranking medical providers at the jail during overnight hours is additional evidence of the RNs supervisory status. *Wilshire at Lakewood*, 345 NLRB No. 80 (September 30, 2005).

E. Conclusion

Based upon the record evidence, it is concluded that the RNs, but not the LPN charge nurses, employed by the Employer are supervisors within the meaning of Section 2(11) of the Act. Accordingly, Registered Nurses shall not be included in the unit found appropriate herein, but Licensed Practical “Charge” Nurses shall be included in the unit found appropriate herein.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid-off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike

who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the International Association of Machinists and Aerospace Workers, AFL-CIO.

VI. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 15's Office, 1515 Poydras Street, Suite 610, New Orleans, Louisiana, **on or before November 22, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by November 29, 2005.

SIGNED at New Orleans, Louisiana this 15th day of November, 2005.

/s/ Rodney D. Johnson
Rodney D. Johnson
Regional Director
National Labor Relations Board
Region Fifteen
1515 Poydras Street
Suite 610
New Orleans, Louisiana 70112

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